

1999

The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up

J.B. Ruhl

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/faculty-publications>



Part of the [Law Commons](#)

Recommended Citation

J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 Notre Dame Law Review. 245 (1999)

Available at: <https://scholarship.law.vanderbilt.edu/faculty-publications/515>

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law School Faculty Publications by an authorized administrator of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

ARTICLES

THE METRICS OF CONSTITUTIONAL AMENDMENTS: AND WHY PROPOSED ENVIRONMENTAL QUALITY AMENDMENTS DON'T MEASURE UP

*J. B. Ruhl**

I. INTRODUCTION

A woman is seated in a restaurant in Moscow, during Soviet rule, and is handed a menu. After a few minutes she orders the roast pork, but is told they no longer serve that dish. She orders the chicken and is told it has sold out. She orders the fish and is told it has gone bad. She orders the beef and is told it has been overcooked. Exasperated, she asks whether she has been handed the menu or the constitution.¹

One way of describing the United States Constitution is as a set of instructions for making decisions about the design and operation of society. Much as a computer's operating-system software provides not answers, but rather the way of arriving at answers, the Constitution is heavy on institutional decision-making rules and light on what form the finished product of those decisions should take.² For the most

* Visiting Associate Professor of Law (1998-99), George Washington University Law School; Professor of Law, Southern Illinois University School of Law. This Article benefited greatly from comments received during presentations at the University of Houston Law Center, the St. Louis University School of Law, and the George Washington University Law School. Pat Kelley, Tom McAfee, John Nagle, and John Dernbach also provided comments, guidance, and inspiration, and Eric Hansell (SIU '99) and Todd Rudloff (SIU '99) provided valuable research assistance. The George Washington University Law School also graciously provided research funding support. Please direct questions and comments to jruhl@main.nlc.gwu.edu.

1 A joke told to me by the Bulgarian jurist and scholar Ewa Letowska.

2 As John Hart Ely observed, the general approach of the Constitution is "not one of trying to set forth some governing ideology . . . but rather one of ensuring a durable structure for the ongoing resolution of policy disputes." JOHN HART ELY, DE-

part, this focus on the "operating system" as the function of the Constitution has remained intact for over two centuries, with very few social policies having been embodied in constitutional text.³ But as modern society has focused debate increasingly on competing visions of social form, advocates have turned increasingly to constitutional amendment proposals as a means of dictating their respective visions.⁴ In other words, we have become more willing seriously to entertain proposals to write social policy decisions—not merely decision-making instructions—directly into the Constitution.⁵

MOCRACY AND DISTRUST 90 (1980). See also Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 441 (1983) ("The Constitution serves both as a blueprint for government operations and as an authoritative statement of the nation's most important and enduring values.").

3 In the last century, for example, only one amendment designed overtly to prescribe social policy has been ratified, see U.S. CONST. amend. XVIII, and it was subsequently repealed, see U.S. CONST. amend. XXI. The remaining amendments ratified during that period concern voting rights or purely constitutive issues. See *infra* text accompanying notes 29–54.

4 See DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS 425 (1996) ("[A] bevy of amendments, designed as much to articulate a position as to achieve adoption, would flourish in the 1980s when striking a constitutional posture became a popular means of dealing with besetting problems of government.").

5 Besides the environmental quality amendment proposals that provide the case study for this Article, examples of recent social policy amendment proposals that have received serious attention include: (1) the religious equality amendment, see Bruce E. Lowry, Jr., *The New Discrimination in America: In Defense of the Religious Equality Amendment*, 16 ST. LOUIS U. PUB. L. REV. 205 (1996); (2) the school prayer amendment, see Walter Dellinger, *The Sound of Silence: An Epistle on Prayer and the Constitution*, 95 YALE L.J. 1631 (1986); Robert S. Peck, *The Threat to the American Idea of Religious Liberty*, 46 MERCER L. REV. 1123 (1995); Geoffrey R. Stone, *In Opposition to the School Prayer Amendment*, 50 U. CHI. L. REV. 823 (1983); (3) the crime victims' rights amendment, see Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839 (1997); (4) the flag burning amendment, see Frank Michelmen, *Saving Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337 (1990); (5) the human life amendment banning abortions, see David Westfall, *Beyond Abortion: The Potential Reach of a Human Life Amendment*, 8 AM. J.L. & MED. 97 (1982); and (6) the Equal Rights Amendment, see MARY FRANCES BERRY, WHY ERA FAILED (1986); JANE J. MANSBRIDGE, WHY WE LOST THE ERA (1986).

A number of recent amendment proposals address the mechanics of government, particularly Congress, and thus are more consistent with the "operating software" function of the Constitution. These include: (1) a congressional term limits amendment, see J. Richard Brown, *Coming to Terms with Congress: A Defense of Congressional Term Limits*, 22 CAP. U. L. REV. 1095 (1993); (2) the fiscal supermajority rule amendment, see Michael B. Rappaport, *Amending the Constitution to Establish Fiscal Supermajority Rules*, 13 J.L. & POL. 705 (1997); (3) the amendment to prohibit unfunded mandates, see Paul Gillmor & Fred Eames, *Reconstruction of Federalism: A Constitutional Amendment to Prohibit Unfunded Mandates*, 31 HARV. J. ON LEGIS. 395 (1994);

Reflecting this trend, proposals to add an environmental quality amendment (EQA) to the Constitution have become fashionable again. EQA proposals first surfaced at the national level in the late 1960s and had their heyday in the early 1970s,⁶ on the coat-tails of the environmentalism euphoria that culminated in the first Earth Day.⁷ By the mid-1970s, however, the command-and-control regime of federal environmental protection legislation had evolved with unprecedented speed into a juggernaut of the administrative state.⁸ The statutory regime eclipsed the notion that an EQA might be needed to catalyze the translation of the environmentalism ethic into hard legal

and (4) the balanced budget amendment, see E. Donald Elliott, *Constitutional Conventions and the Deficit*, 1985 DUKE L.J. 1077.

6 Typical of amendment resolutions introduced in Congress during that period was one purporting to protect "[t]he right of the people to clean air, pure water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of the environment. . . ." H.R.J. Res. 1321, 90th Cong., 2d Sess. (1968). For summaries of this and other early EQA proposals, see J. William Futrell, *Environmental Rights and the Constitution*, in AMERICAN LAW INSTITUTE-AMERICAN BAR ASSOCIATION, *BLESSINGS OF LIBERTY* 43, 50 (1988); Pamela B. Schmaltz, *Is It Time for an Environmental Amendment?*, 38 LOY. L. REV. 451, 461-62 (1993).

7 For a first-hand account of the events leading to Earth Day 1970 by the founder of the idea, see Milo Mason, *Interview: Gaylord Nelson*, NAT. RESOURCES & ENV'T, Summer 1995, at 72. The growing public mood in favor of environmental regulation may have spawned the first EQAs, but was far more pivotal in ushering in the federal statutory program of the 1970s. See J. William Futrell, *The History of Environmental Law*, in ENVIRONMENTAL LAW INSTITUTE, *ENVIRONMENTAL LAW FROM RESOURCES TO RECOVERY* §1.2(H)(2), at 40 (1993); PETER C. YEAGER, *THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION* 99-110 (1991) (tracing the surge in public mood and concluding that "the growing environmental movement was to stimulate relatively radical changes in law, most notably at the federal level"); Dinah Bear, *The National Environmental Policy Act: Its Origins and Evolutions*, NAT. RESOURCES & ENV'T, Fall 1995, at 3-4 (describing public mood as a critical factor in the enactment of the National Environmental Policy Act); C. Peter Gopelrud III, *Water Pollution Law: Milestones from the Past and Anticipation of the Future*, NAT. RESOURCES & ENV'T, Fall 1995, at 7, 8 (describing public mood as a critical factor in the enactment of the Clean Water Act).

8 Described as the "explosion of environmental law," from 1970 through 1976, in quick order Congress newly enacted or substantially amended ten major environmental regulation statutes covering air, water, and land pollution, project planning, workplace safety, manufacturing, species protection, and public drinking water. See Futrell, *supra* note 7, §1.2(I)(1)-(3), at 43-45 (collecting statutes); ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION* 106-10 (2d ed. 1996) (same). That record was nearly duplicated during the same period in the field of natural resources protection. See Futrell, *supra* note 7, §1.2(I)(3), at 48 (collecting statutes). The process continued into the 1980s, albeit at a slower pace. See PERCIVAL, *supra*, at 111-12 (collecting statutes). Some laws were changed more than once in this period, each time boosting the degree of federal dominance. See John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1183-85 (tracing changes to federal air pollution control legislation).

and policy frameworks.⁹ EQA proposals thus gradually fell out of favor during the late 1970s and were virtually unmentioned in the 1980s.¹⁰

Amazingly, however, notwithstanding the phenomenal legal and political infrastructure that has built up at all levels of government around the goal of environmental protection since the first Earth Day, the push for an EQA is back in full force. Since 1990, several such measures have been offered by groups as diverse as New Jersey fifth graders and well-funded environmental preservation organizations.¹¹ Most prominently, members of thirty-seven state legislatures launched an initiative to have such a resolution introduced in Congress.¹² Their proposed EQA declares:

The natural resources of the nation are the heritage of present and future generations. The right of each person to clean and healthful air and water, and to the protection of other natural resources of the nation, shall not be infringed by any person.¹³

These two sentences, faithful to the constitutional tradition of conciseness, express an elegant message of national commitment to environmental protection and to a future of environmental sustainability. Indeed, the revival of EQAs as serious proposals can be

9 See Futrell, *supra* note 6, at 50; Schmaltz, *supra* note 6, at 462.

10 The nation's largest environmental group, the National Wildlife Federation, proposed an EQA in the 1980s, see Futrell, *supra* note 6, at 51, but other than that "[t]he idea of an environmental amendment has lain dormant for twenty years and is only now gathering steam." Schmaltz, *supra* note 6, at 462 n.70.

11 See Schmaltz, *supra* note 6, at 464-67 (summarizing proposals, and making one too).

12 See Richard L. Brodsky & Richard L. Russman, *A Constitutional Initiative*, DEFENDERS, Fall 1996, at 37 (two state legislators lay out their plan for the EQA); see also Roger Schlickeisen, *Epilogue: The Argument for a Constitutional Amendment to Protect Living Nature*, in BIODIVERSITY AND THE LAW 221-42 (William J. Snape ed., 1996) (outlining the case for an EQA).

13 Brodsky & Russman, *supra* note 12, at 37. Resolutions requesting the United States Congress to submit this EQA language to the states have been introduced in a number of states, albeit none with success. See, e.g., Md. H.J.R. 2 (1997); N.H. S.J.R. 3 (1997); N.J. A.C.R. 38 (1998); Tex. H.C.R. 13 (1997); Va. S.J.R. 230 (1996); Wis. A.J.R. 35 (1997). Schlickeisen's EQA proposal also emphasizes intergenerational rights, but limits the effect to *living* natural resources:

The living natural resources in the United States are the common property of all the people, including generations yet to come. All persons and their progeny have an inalienable, enforceable right to the benefits of those resources for themselves and their posterity. The United States and every State shall ensure assure that the use of those resources is sustainable and that they are conserved and maintained for the benefit of all the people.

Schlickeisen, *supra* note 12, at 243.

traced to the emergence of a new theme of environmentalism—biodiversity conservation.¹⁴ Within roughly the past decade, the scientific community has distilled a revised scientific paradigm of ecosystem dynamics into the discipline of conservation biology¹⁵ and has percolated the new model into legal and policy proposals at all levels of government.¹⁶ The swiftness with which the biodiversity

14 See, e.g., Eric T. Freyfogle, *Essay on the Bill of Rights: Should We Green the Bill?*, 1992 U. ILL. L. REV. 159; Roger Schlickeisen, *Protecting Biodiversity for Future Generations: An Argument for a Constitutional Amendment*, 8 TUL. ENVTL. L.J. 181 (1994). Biodiversity is "[t]he variety of organisms considered at all levels, from genetic variants to the same species through arrays of species to arrays of genera, families, and still higher taxonomic levels." EDWARD O. WILSON, *THE DIVERSITY OF LIFE* 393 (1992). See also Convention on Biological Diversity, 31 I.L.M. 818, 823 (1992) (defining biological diversity as "the variability among living organisms . . . includ[ing] diversity within species, between species and of ecosystems"); UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *THREATS TO BIOLOGICAL DIVERSITY IN THE UNITED STATES* 10 (1990) (biological diversity "is the variety of life on all levels of organization, represented by the number and relative frequencies of items").

15 Conservation biology has emerged as a biological sciences discipline largely in the past decade, as traced by its chief literature and research outlet, the journal *Conservation Biology*. A focal point of conservation biology research has been to demonstrate the often pernicious effects of habitat fragmentation and loss of species. The focus of scientific research geared towards ecosystem-level dynamics has revealed the dramatic impacts that habitat loss has had on biodiversity generally. See, e.g., UNITED STATES DEPARTMENT OF THE INTERIOR, *OUR LIVING RESOURCES* (1996); U.S. Dep't of the Interior/National Biological Service, Biological Rep. 28, *Endangered Ecosystems of the United States: A Preliminary Assessment of Loss and Degradation* (U.S. Dep't of the Interior/National Biological Service) (1995); Scott K. Robinson et al., *Regional Forest Fragmentation and the Nesting Success of Migratory Birds*, SCIENCE, Mar. 31, 1995, at 1987.

16 See Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265 (1991); James Drodzowski, *Saving an Endangered Act: The Case for a Biodiversity Approach to ESA Conservation Efforts*, 45 CASE W. RES. L. REV. 553 (1995); Oliver A. Houck, *On the Law of Biodiversity and Ecosystem Management*, 81 MINN. L. REV. 869, 959 (1997); J. B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?*, 66 U. COLO. L. REV. 555 (1995). For a summary of the ecosystem management and biodiversity conservation policy formulation initiatives of eighteen federal agencies, see CONGRESSIONAL RESEARCH SERVICE, *ECOSYSTEM MANAGEMENT: FEDERAL AGENCY ACTIVITIES*, CRS Rep. No. 94-339 (1994). Ecosystem management and biodiversity conservation are now standard fare of environmental groups' policy proposals. See, e.g., BIODIVERSITY AND THE LAW, *supra* note 12 ("The assumption in this book is that biodiversity, and lots of it, should be conserved and preserved by law."); THE KEYSTONE CENTER, *THE KEYSTONE CENTER DIALOGUE ON ECOSYSTEM MANAGEMENT* (1996); STEVEN YAFFEE ET AL., *THE WILDERNESS SOCIETY, ECOSYSTEM MANAGEMENT IN THE UNITED STATES* (1996). For differing views on this new paradigm of conservation policy, compare R. Edward Grumbine, *What Is Ecosystem Management*, 8 CONSERVATION BIOLOGY 27 (1994) (advocating movement towards this approach) and R. Edward

theme has unified environmental protection policy surpasses even the speed with which the first generation of environmental legislation came on line, and EQA proposals are a means of embodying this movement as nothing less than a constitutive norm for society. History is thus, in a sense, repeating itself, as the banner-holders of biodiversity rush toward EQA proposals as a means of securing permanent political and moral ground much as Earth Day supporters did over twenty-five years ago.

The problem for the champions of biodiversity is that, without exception, every EQA proposal made in the past and being put on the table today is an absolute failure in the sense of approaching what makes a sound amendment to the Constitution. Indeed, no commentator or legislator who has proposed an EQA has endeavored to explain why an EQA would be *constitutionally* sound, as opposed to being good for the environment. The latter proposition is debatable,¹⁷ but the former is not a close call—an EQA does not belong in the Constitution.

There have been over ten thousand proposed amendments to the Constitution.¹⁸ Only a handful have become a part of our law, and only one obviously unsound amendment¹⁹ has made it through the

Grumbine, *Reflections on "What is Ecosystem Management,"* 11 CONSERVATION BIOLOGY 41 (1997) (same), with Rebecca W. Thomson, "Ecosystem Management" Great Idea, But What Is It, Will It Work, and Who Will Pay?, NAT. RESOURCES & ENV'T, Winter 1995, at 42 (pointing out difficulties of the approach).

17 I do not intend to debate it at length here. To be sure, whether the proposed EQA would fare well under the evaluative standards I propose herein for constitutional amendments may tell us something about how well it would work on behalf of the environmental protection goals it espouses, as it may be that an amendment that fares poorly under my criteria would not likely achieve its normative objectives. But it is possible for an amendment effectively to achieve its normative goals and nonetheless pose serious concerns with respect to constitutional integrity. My focus thus is strictly on how the EQA and other amendment proposals can be evaluated with reference to the Constitution as an institution. For a brief discussion of the EQA in that regard, see J. B. Ruhl, *An Environmental Rights Amendment: Good Message, Bad Idea*, 11 NAT. RESOURCES & ENV'T, Winter 1997, at 46.

18 See JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-1995*, ix-xi, 363-80 (1996) (collating proposals by year); RICHARD B. BERNSTEIN & JEROME AGEL, *AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?* 169 (1993); Ruth B. Ginsburg, *On Amending the Constitution: A Plea for Patience*, 12 U. ARK. LITTLE ROCK L.J. 677, 681-92 (1990).

19 I refer, of course, to the Eighteenth Amendment and the era of Prohibition it imposed. For a thorough discussion of the rise and fall of national prohibition and the constitutional issues surrounding the adoption and repeal of the Eighteenth Amendment, see Thomas E. Heard, *Proposed Constitutional Amendments as a Research Tool: The Example of Prohibition*, 84 LAW LIBR. J. 499 (1992).

Constitution's rigorous Article V amendment process.²⁰ Article V thus appears to serve as a strong filter against wrongheaded decision-dictating amendments, and hence there is little chance that an EQA will ever find its way into the Constitution. As a practical matter, the discussion with respect to EQAs could end here.

But the vigor with which EQA proposals are made suggests that it would be useful to do more than simply rely on the procedural difficulties of amending the Constitution as our insurance against folly. In addition, for purposes of articulating why other proposed social policy amendments might or might not make sense as a matter of constitutional framework, it would be useful to develop a set of general standards for measuring what makes for a sound amendment to the Constitution.²¹ Perhaps because there have been so few amendments, and only one of those a disaster, no one has collected such a set of evaluation metrics for constitutional amendments.

This Article develops such a framework for evaluating the soundness of proposed social policy amendments to the Constitution, using the current EQA proposals as a case study to test the framework's application. In this sense I am proposing a theory that does not depend on evaluating the normative substance of the underlying proposed amendment. Indeed, it would not matter whether an EQA was "pro-

20 See U.S. CONST. art. V. For discussions of the Article V amending procedures as an obstacle to new amendments, see RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995) [hereinafter RESPONDING TO IMPERFECTION]; JOHN R. VILE, CONSTITUTIONAL CHANGE IN THE UNITED STATES 1-13 (1994); Donald J. Boudreaux & A.C. Pritchard, *Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process*, 62 FORDHAM L. REV. 111 (1993); Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983); Kris W. Kobach, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 YALE L.J. 1971 (1994). For a survey of procedures for amending various state and national constitutions, see Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251 (1996).

21 Although the Founders devoted considerable debate to the amending procedure, including whether there should be any accommodation for amendment, see Brannon P. Denning, *Means to Amend: Theories of Constitutional Change*, 65 TENN. L. REV. 155, 160-75 (1997); Sanford Levinson, "Veneration" and Constitutional Change: *James Madison Confronts the Possibility of Constitutional Amendment*, 21 TEX. TECH. L. REV. 2443 (1990), virtually none of the ratifying debates focused on what kind of amendment would be appropriate. Similarly, the focus on institutional fit, rather than Article V procedural issues or a proposal's normative merit, is not common in the modern constitutional law literature. An exception is an ongoing effort by one legal organization to establish evaluative standards for constitutional amendments that blends institutional, procedural, and normative criteria. See Citizens for the Constitution, "Great and Extraordinary Occasions": Developing Standards for Constitutional Change (1997 final draft on file with author) [hereinafter Developing Standards].

environment" or "anti-environment," whatever those highly charged political labels mean; rather, *any* EQA attempting to capture a normative statement about the environment and plug it into the United States Constitution is simply a bad idea.²²

22 This is as good a point as any to acknowledge that many states and other nations have a constitutional provision that guarantees some form of environmental rights; however, for the most part "[t]hey are more expressive of a sentimental urge than an exercise in rearranging power," and "[t]he experience . . . suggests that they have not been important legal tools for environmental protection." Futrell, *supra* note 6, at 51; see also Elizabeth S. Goldman & Stewart E. Sterk, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 WIS. L. REV. 1301, 1304 ("Many [state] constitutional provisions have little to do with the structure of state government, but reflect instead a desire by drafters to indicate the importance of a particular issue by enshrining it in the supreme law of the state."); John L. Horwich, *Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self-Delusion?*, 57 MONT. L. REV. 323, 326 (1996) ("Those who believed state constitutional environmental provisions represented a watershed for environmental protection have been sorely disappointed."). It is dangerous to extrapolate from the constitutional experience of states and other nations to draw conclusions about the United States Constitution. For example, many states have amended their constitutions hundreds of times, suggesting a vastly different attitude about amending than is the case for the Constitution. See Stephen M. Griffin, *The Problem of Constitutional Change*, 70 TUL. L. REV. 2121, 2140-41 (1996) ("At the state level, change occurs much more often in the form of amendments, the entire constitution is sometimes revised in constitutional conventions, and the constitution becomes, in adapting to changing circumstances, much longer and more like ordinary statutes."); Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in *RESPONDING TO IMPERFECTION*, *supra* note 20, at 237, 247-50. The fact that some states and nations have EQAs thus does not necessarily mean the Constitution should, nor does the fact that few of the EQAs have mattered much in the law of those states and nations necessarily mean that an EQA in the Constitution would be inconsequential. Hence, I limit the discussion of those other jurisdictions to experiences that may meaningfully inform the debate about a federal EQA and the broader question of how to evaluate constitutional amendments. For more comprehensive discussions of state EQAs, see Richard O. Brooks, *A Constitutional Right to a Healthful Environment*, 16 VT. L. REV. 1063 (1992); Mary Ellen Cusack, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173 (1993); Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333 (1993); Margaret J. Fried & Monique J. Van Damme, *Environmental Protection in a Constitutional Setting*, 68 TEMPLE L. REV. 1369 (1995); Greg L. Johnson, *Constitutional Environmental Protection in Louisiana: Losing the Reason in the Rule of Reasonableness*, 42 LOY. L. REV. 97 (1996); A. E. Dick Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193 (1972); Fernando M. Pinguelo, *Laboratory of Ideas: One State's Successful Attempt to Constitutionally Ensure A Healthier Environment*, 4 BUFF. ENVTL. L.J. 269 (1997); Oliver A. Pollard III, *A Promise Unfulfilled: Environmental Provisions in State Constitutions and the Self-Execution Question*, 5 VA. J. NAT. RESOURCES L. 351 (1988); Neil A.F. Popovi, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENVTL. L.J. 338 (1996); and for thoughtful discussions of other nations' EQAs, see Gyula Bandi, *The Right to Environment in Theory and Practice*:

To develop this thesis of constitutional metrics, an important first step is to define the method for describing and comparing the relevant qualities of different constitutional amendments. I develop such a classification model in Part I of the Article based on an amendment's institutional "fit" within the Constitution. Most other classifications of amendments focus either on the social factors that led to the amendment²³ or the effects the amendment had on society.²⁴ But regardless of whatever exogenous conditions motivate their proposal, and regardless of the effects they may have on law and society, each amendment can be mapped on a biaxial matrix based on its text's constitutive function and target. The function axis describes the amendment's basic institutional role among four possibilities: (1) altering the operational rules of government; (2) prohibiting specified government action; (3) creating or affirming rights; or (4) expressing aspirational goals.²⁵ The target axis describes the possible social relations that are the target of the function: (1) intra- and intergovernmental relations; (2) relations between government and citizen; or (3) relations between citizens.

Classifying amendments in this manner illustrates the important point that the text of very few existing amendments ventures into the aspiration statement function or the citizen-citizen relation target, and no existing amendment purports to do both—that is, to establish aspirations for citizen-citizen relations. When a proposed amendment strays into those zones, as the EQA does, some basis for evaluation is

The Hungarian Experience, 8 CONN. J. INT'L L. 439 (1993); Ernst Brandl & Hartwin Bungert, *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad*, 16 HARV. ENVTL. L. REV. 1, 14–15 (1992); Elizabeth F. Brown, *In Defense of Environmental Rights in East European Constitutions*, 1993 U. CHI. L. SCH. ROUNDTABLE 191.

23 Some treatments group the amendments into historical amending episodes usually corresponding with the Bill of Rights (1791–1804), Reconstruction (1865–1870), the Progressive Era (1913–1920), and the civil rights movement (1960s), in which the exogenous political and social conditions precipitated certain kinds of amendments. See VILE, *supra* note 18, at 19–24; Ginsburg, *supra* note 18, at 681–86.

24 One commentator classifies amendments based on the degree to which they forestall or initiate change in society, see VILE, *supra* note 18, at 26, while two others focus on an amendment's effects on economic efficiency, see Boudreaux & Pritchard, *supra* note 20, at 111.

25 One early classification of amendments and proposed amendments focuses on part of the function side of my proposed classification system, dividing the measures into those which affect the form of government, with subcategories for legislative, executive, and judicial forms, and those affecting the powers of government. See Michael Angelo Musmanno, *Proposed Amendments to the Constitution*, H.R. Doc No. 551 (1929).

needed to determine whether the unusual approach of the measure is justified.

Responding to that need, in Part II of the Article, I outline the qualities that are necessary to make a sound amendment to the Constitution and which must be demanded rigorously of any proposed amendment that purports to express aspirational goals, to address citizen-citizen relations, or, worst of all, to do both as does the EQA. I have derived these principles from a rather amorphous body of commentaries and other sources in which one or more of these qualities has been discussed or suggested. When collected into a unified theory, they fall into two categories of "filters" by which to evaluate social policy amendments: first-level filters that define whether an amendment to dictate a particular social policy generally is socially acceptable and institutionally necessary given conditions in the social and political realms, and second-level filters used to test the implementability of specific proposals to embody the social policy decision. Using that model, I explore the following qualities that should be present in proposed social policy amendments:

First-Level Filters

1. Supported by broad social approval.
2. Not capable of being fully implemented through other political and legal institutions.

Second-Level Filters

1. Reducible to legal principles that are binding in effect.
2. Sufficiently clear to minimize unanticipated interpretations.
3. Enduring even in the face of shifting political climates.

Some commentators have focused on one or a few of these qualities either because of personal priorities or because obvious deficiencies of a particular proposed amendment did not necessitate a broader focus. My purpose here is to synthesize the current hodgepodge of theses into one framework that can be used to test any social policy amendment proposal. The synthesis is important, I posit, because satisfying one or a few of these qualities is not sufficient to make a sound amendment. Indeed, because these qualities, when stated as a whole, contain countervailing forces, very few proposed amendments can satisfy all of them. And that is how it should be.

Throughout Part II of the Article, as I describe each filter, I also demonstrate the operation of the framework, the importance of the conflicting constraints demanded by the synthesis, and the difficulty of passing the test imposed, by subjecting the EQA to critical scrutiny under each item in the checklist. Indeed, because it is partly aspirational in nature and deals with a subject matter that continues to be at

the center of social and political controversy, the EQA classically illustrates how difficult it can be for social policy amendments to satisfy *any* of the requisite qualities. Any EQA that could attract broad social support would require textual drafting manipulations that would dissolve the provision into utter ambiguity; any EQA that could be drafted with sufficient precision to avoid ambiguity and result in binding legal principles would lose significant social support and would be too narrow to be easily implemented; and so on. The conflicting constraints demanded by the proposed criteria allow very few proposals to qualify—only the most accepted, important, necessary, enforceable, clear, and enduring need apply for a position in the Constitution.

II. CLASSIFICATION METRICS: MEASURING CONSTITUTIONAL AMENDMENTS BASED ON INSTITUTIONAL FUNCTION AND TARGET SOCIAL RELATIONS

To revise an operating system, one must *do* something *to* something in the system. In other words, the measure must have a function and a target. Every proposed amendment has a function and a target as well, in the sense that it is designed to alter the current constitutive structure in some way by affecting the rights, powers, or composition of some constitutional actor.²⁶ Although classifications of amendments based on exogenous social conditions or effects are useful in the evaluation of amendments, I demonstrate in this section that a classification based on a textual analysis of function and target provides tremendous insight into the constitutive status of amendments and thereby reveals much about the danger lurking in EQAs and other proposed social policy amendments.

A. A Biaxial System for Classifying Amendments

It is important not to allow the process of classification to obscure the reason for the differences that allow the classification in the first place.²⁷ Ultimately, a proposed amendment lives or dies because of politics. But a classification system based not on analysis of political conditions, but rather on what the amendment *says*, will nonetheless inform the political debate for proposed amendments and help us

26 There are exceptions, such as the proposed amendment to change the name of the nation to the United States of Earth. See Daniel L. May, *The Third Vice President of the United States of Earth*, 73 A.B.A. J. 76 (1987).

27 Consider, for example, Karl von Linné's teleologically motivated taxonomic classification of species, which remains the foundation of modern species classifications (the Linnean system), but which Charles Darwin, not Linné, explained in terms of cause. See JONATHAN WEINER, *THE BEAK OF THE FINCH* 20–25 (1994).

understand how the politics matter. The textually announced function and target of a proposed amendment is, after all, what the politics must evaluate, process, and decide.²⁸ Moreover, whoever has drafted a proposed amendment presumably has taken politics into mind. Hence, I engage in the exercise of textual classification based on function and target with the acknowledgment that it does not replace political analysis of amendments, but with the conviction that it illuminates that analysis.

1. Function

The first element to extract from the amendment's text is the avowed functional purposes, for which a spectrum of possibilities exists. Closest to the operating system model of the Constitution, an amendment may simply change the way the business of governing is conducted. At the other end of the spectrum are amendments laden with aspirational expressions carrying little or no functional objective. Between are amendments that police relations between constitutional actors, either by prohibiting some defined act or by creating or affirming a defined right. Examples exist among the current amendments to the Constitution for all but the aspirational category.

a. Operational

Many amendments since the Bill of Rights, and particularly since the 1950s, are purely operational in function. For example, the most recent Amendment, the Twenty-Seventh, simply lays out when pay raises for Senators and Representatives may take effect.²⁹ The text leaves unspoken whatever exogenous conditions or aspirations motivated the amendment, and expresses no prohibitions or rights. It is pure operating system text. Similarly, all or parts of the Twelfth,³⁰ Fourteenth,³¹ Sixteenth,³² Seventeenth,³³ Twentieth,³⁴ Twenty-First,³⁵

28 See Tribe, *supra* note 2, at 440 ("The Constitution tells us *something*, and what it says—although necessarily read through lenses we ourselves bring to the task—must be the touchstone for evaluating the substantive appropriateness of any proposed amendment.").

29 U.S. CONST. amend. XXVII.

30 U.S. CONST. amend. XII (establishing the procedures of the Electoral College).

31 U.S. CONST. amend. XIV, §§ 2–3 (establishing apportionment of Representatives and criteria for disqualifying persons from office).

32 U.S. CONST. amend. XVI (establishing Congress' income taxation power).

33 U.S. CONST. amend. XVII (establishing the composition and election of the Senate).

34 U.S. CONST. amend. XX (establishing the dates of the terms of the President and Vice-President).

Twenty-Second,³⁶ Twenty-Third,³⁷ and Twenty-Fifth³⁸ Amendments are purely operational in function.

b. Prohibitory

We associate the majority of existing amendments with rights, usually the rights of citizens. The text of most of those amendments, however, is prohibitory in function, so that the rights are established by negative implication.³⁹ For example, the First Amendment establishes the "right" to freedom of speech through the prohibition that "Congress shall make no law . . . abridging the freedom of speech." While it is often noted that this and other amendments in the Bill of Rights addressed what were considered pre-established rights,⁴⁰ the operative function of this and many other amendments associated with rights is purely prohibitory in focus. Thus, the operative language of all or parts of the Second,⁴¹ Third,⁴² Fourth,⁴³ Fifth,⁴⁴ Eighth,⁴⁵ and Ninth⁴⁶ Amendments, and of the portion of the Fourteenth Amendment incorporating due process rights with respect to

35 U.S. CONST. amend. XXI (repealing the Eighteenth Amendment).

36 U.S. CONST. amend. XXII (establishing the maximum terms of the President).

37 U.S. CONST. amend. XXIII (establishing the District of Columbia's representatives to Congress).

38 U.S. CONST. amend. XXV (establishing the order of succession to the Presidency in cases of death or resignation, the procedures for filling of vacancies in the office of Vice-President, and procedures for removal of the President).

39 See generally Futrell, *supra* note 6, at 52; Schmaltz, *supra* note 6, at 457-58.

40 See VILE, *supra* note 18, at 19-20; BERNSTEIN & AGEL, *supra* note 18, at 49.

41 U.S. CONST. amend. II (right to bear arms "shall not be infringed").

42 U.S. CONST. amend. III ("no soldier shall" be quartered).

43 U.S. CONST. amend. IV (rights against unreasonable search and seizure "shall not be violated, and no Warrant shall issue").

44 U.S. CONST. amend. V ("no person shall be held" without indictment; "nor shall any person be subject" to double jeopardy; "nor shall be compelled" to provide witness against himself or herself; "nor be deprived" without due process; "nor shall private property be taken for public use without just compensation").

45 U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.").

46 U.S. CONST. amend. IX (the enumeration of rights "shall not be construed to deny or disparage" retained rights).

the states,⁴⁷ follows the prohibitory function model. And all of the modern voting rights amendments follow this model.⁴⁸

c. Rights Creating or Affirming

As the preceding discussion suggests, surprisingly few of the amendments associated with rights focus textually on the positive creation or affirmation of rights. Nevertheless, although they embody what were taken at the time of ratification as pre-existing rights, the texts of the Sixth,⁴⁹ Seventh,⁵⁰ and Tenth⁵¹ Amendments purport to create or affirm rights. The rights amendments since the Bill of Rights follow the prohibitory function model without exception.

d. Aspirational

No purely aspirational expressions exist in any amendment to the Constitution.⁵² Particularly given the prevalence of aspirational human rights statements in international policy documents, some of which have been incorporated in other nations' constitutions,⁵³ the absence of aspirational text in the United States Constitution is one of its defining characteristics.⁵⁴ Of course, many aspirational amendments have been proposed, and nothing in the Constitution prevents their adoption; hence, it is not inappropriate to include the category

47 U.S. CONST. amend. XIV, §1 ("[n]o state shall make or enforce any law which shall abridge" privileges and immunities; "nor shall any State deprive" life, etc. without due process; "nor deny" equal protection).

48 The voting rights amendments follow the model: "The right of citizens of the United States . . . to vote . . . shall not be denied or abridged. . . ." See U.S. CONST. amends. XV (race, color, servitude), XIX (gender), XXIV (poll tax), XXVI (age).

49 U.S. CONST. amend. VII ("In Suits at common law . . . the right of trial by jury shall be preserved. . . .").

50 U.S. CONST. amend. X (powers not delegated to United States or prohibited to the States are "reserved to the States . . . or to the people").

51 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right. . . .").

52 Some commentators count the Eighteenth Amendment as aspirational, *see, e.g.,* Futrell, *supra* note 6, at 52; however, while surely it was motivated primarily by prohibition-minded aspirations, textually it was strictly prohibitory in nature. See U.S. CONST. amend. XVIII, § 1 ("the manufacture, sale, or transportation of intoxicating liquors . . . for beverage purposes is hereby prohibited").

53 See Paula Rhodes, *An Afro-American Perspective: We the People and the Struggle for a New World: The Constitution of the United States of America and International Human Rights*, 1987 How. L.J. 705.

54 See John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 484 (1978) ("[O]nly rarely has our Constitution attempted to tell elected officials what substantive values to favor or disfavor. . . .").

for purposes of classification (or, more accurately, to illustrate the point of their absence).

2. Target

In order to have any effect, each functional statement in an amendment must have a defined target in terms of whose operational status or rights it alters. The existing amendments have taken three approaches to defining targets, differing with respect to the social relations involved.

a. Intra- and Intergovernmental

As the operational tasks of the Constitution are carried out by government, all of the amendments I characterize as operational in function also focus exclusively on intra- or inter governmental relations as their target, such as who may remove the President (intra-governmental)⁵⁵ and how states elect federal officials (intergovernmental).⁵⁶ Not surprisingly, the amendment in this category that speaks most forcefully to relations between the federal and state sovereigns, the Eleventh Amendment, does so through the prohibitory function model.⁵⁷ In addition, the Tenth Amendment reserves for the states (and people) powers not enumerated to the federal government or prohibited to the states, and thus addresses relations between the two governmental domains.⁵⁸

b. Government and Citizen

All of the amendments associated with rights, whether prohibitory or positive in function, involve relations between government and citizen. As noted above, the Tenth Amendment reserves unenumerated and nonprohibited powers not only to the states, but also to the people, and thus falls into two target categories. In addition, the Sixteenth Amendment's operational creation of federal income-taxing power necessarily targets government-citizen relations, as presumably it is the citizens' income that is to be taxed.

55 U.S. CONST. amend. XXV.

56 U.S. CONST. amend. XVII.

57 U.S. CONST. amend. XI (establishing states' sovereign immunity by stating the prohibition that "[t]he Judicial power of the United States shall not be construed").

58 U.S. CONST. amend. X.

c. Citizen and Citizen

The rare creature in the Constitution in terms of target is the relation of citizen to citizen. Among existing amendments, only the Thirteenth Amendment affects relations between citizens, abolishing slavery and involuntary servitude through the prohibitory function model.⁵⁹ The Eighteenth Amendment also qualified as one of this variety, given its broad prohibition of sales transactions between citizens involving liquor.⁶⁰ Beyond that, the existing amendments are silent with respect to civil relations.

B. *Lessons Learned and Applied*

My purpose in engaging in the rather formalistic textual dissection of the existing amendments to the Constitution is to make one point loudly and clearly: amendments purporting to express aspirational values or regulate civil relations, or do both, should set off bells and whistles in the political evaluation process. As the summary plot in Figure 1 illustrates, only two amendments fitting that description have passed through the eye of the Article V needle. One followed on the heels of civil war, and the other—the unmitigated disaster of Prohibition—is with us no longer. This history suggests that the political process and the rigors of Article V have combined to erect a strong screen against proposed amendments that fall outside the shaded area in Figure 1—i.e., those straying far from the operating-system function of the Constitution. The darker shaded area represents the area of the matrix most closely associated with the operating system function of the Constitution; the lighter shaded area includes amendments one step away from that tighter configuration, but which are nonetheless focused on the rules respecting rights and government. The unshaded area, by contrast, includes aspirational statements and civil relations, subject matter far from the core operating-system function, with the upper right hand corner of Figure 1—amendments that are aspirational in function *and* targeted on civil relations—representing the farthest an amendment could stray from the Constitution's basic purpose.

59 U.S. CONST. amend. XIII.

60 U.S. CONST. amend. XVIII, § 1.

FIGURE 1

FUNCTION

ASPIRATIONAL			
RIGHTS CREATING OR AFFIRMING	10	10, 6, 7	
PROHIBITORY	11	1, 2, 3, 4, 5, 8, 9, 14(§1), 15, 19, 24, 26	13, (18)
OPERATIONAL	12, 14(§2), 17, 20, 21, 22, 23, 25, 27	16	
	INTRA- OR INTER- GOVERNMENTAL	GOVERNMENT TO CITIZEN	CITIZEN TO CITIZEN

TARGET RELATIONS

To be sure, this retrospective classification of the existing amendments imposes no normative evaluation of past or prospective “outliers.” Neither the Constitution itself nor the Framers’ debates define the outlier territory and place it off limits; rather, the apparent history of amendments has evolved so as to disfavor amendments in the outlier zone. Even if the Framers had consciously decided to avoid or prohibit what we today can describe as outlier amendments, that decision would always be subject to revisiting. But the fact that we have stayed on a path away from outlier amendments, whether that has been by deliberate policy or by accident, makes the case for staying on that path more powerful. After more than two centuries, we still have no meaningful experience with such amendments—i.e., how they would interact with the body of the Constitution and the existing amendments; how they would influence the evolution of sociolegal policy; and how they would affect the perception of the Constitution as a constitutive statement. They are, in other words, high risk propositions. Hence, while I do not go so far as to suggest we should disqualify proposed outlier amendments per se, I believe the history of the existing amendments forcefully supports the case that we should approach future outlier proposals with extreme caution.

Before asking the obvious questions regarding what evaluative criteria the political process has or should have used to screen such amendments, pause for a moment to ask where the EQA falls on this classification system. Indeed, what is striking about the EQA is that it is hard to tell exactly what its parameters are under the function-target

classification system. I outline this target "space" in Figure 2. The first sentence declares that "[t]he natural resources of the nation are the heritage of present and future generations," thus appearing to create or affirm rights by positive expression. The second sentence, proclaiming that specified environmental quality rights "shall not be infringed upon by any person," adopts a prohibitory function model approach with citizen-citizen relations as its target. At a minimum, therefore, the EQA falls squarely in the area defined by Box A in Figure 2.

FIGURE 2

FUNCTION

ASPIRATIONAL			B
RIGHTS CREATING OR AFFIRMING		C	A
PROHIBITORY			
OPERATIONAL			
	INTRA- OR INTER- GOVERNMENTAL	GOVERNMENT TO CITIZEN	CITIZEN TO CITIZEN

TARGET RELATIONS

Arguably, however, the choice of the term *heritage* in the first sentence, particularly when used with reference to *generations*, expresses an aspirational social policy goal, as it is not readily apparent how a future generation can have "heritage" in the strict legal sense of a right to inheritance.⁶¹ Possibly, therefore, the EQA could be construed as also extending into the area bounded by Box B in Figure 2.

Similarly, it is not clear whether the prohibitory function of the second sentence targets not only citizen-citizen relations, but also government-citizen relations by virtue of the reference to a right "to *pro-*

61 The authors of the version of the EQA being introduced in state legislatures do not elaborate on the scope of their proposal sufficiently to draw conclusions in this regard. In his version of the EQA, however, Rodger Schlickeisen uses the term "common property" in place of "heritage," and contends that the EQA "should establish the right to benefits of living nature and explicitly extend the right to future generations as a class." See Schlickeisen, *supra* note 12, at 234. The aspirational component of his EQA thus may be implicit rather than one of its primary purposes.

tection of other natural resources of the nation." Presumably the government (though which government is not clear) is supposed to carry out the "protection" function, in which case the EQA may be construed as creating not only a prohibition on government actions failing to protect natural resources, but also those failing to intervene to prevent citizen actions that threaten the environment.⁶² If so, the EQA also extends into the area defined by Box C in Figure 2.

Regardless of whether we read the EQA to fall narrowly within Box A only, or broadly to extend also into Boxes B, C, or both, it is beyond question that the EQA would be a constitutional anomaly. The core of the proposal falls in the citizen-citizen target category—enough to raise a red flag—and a reasonable construction of the measure extends it into the danger zone of the aspirational function category. Indeed, at its broadest construction it encompasses a large range of function-target combinations as no existing amendment does. In short, the EQA is so out of the ordinary for the function and target characteristics of constitutional amendments as to raise serious questions about its candidacy for a position in the Constitution.

III. EVALUATION METRICS: MEASURING CONSTITUTIONAL AMENDMENTS BASED ON ACCEPTANCE, NEED, AND IMPLEMENTATION

EQA supporters might suggest that the concerns raised in the preceding section are matters only of text, and hence they can be solved simply by changing the text of the proposal to fit more neatly within the historical experience—i.e., within the shaded area in Figure 1. Indeed, one value of the classification and plotting of proposed amendments may be to identify amendments with broad, cumbersome "footprints" and thereby assist in the drafting process. Tightening the language to correspond more closely to the historical amending experience may improve the chances a proposal will be ratified and perform as intended. But it is not so simple for the EQA. Indeed, the textual analysis reveals much about politics after all, as it is precisely because the EQA is a social policy maelstrom that its text appears as it does. And it is precisely because the text appears the way it does that the EQA should never, and likely will never, become a part of the Constitution.

I demonstrate both points in this section by asking a series of questions about the EQA. The questions fall into two categories.

62 This is clearly the intent of Roger Schlickeisen's similarly worded EQA, which he contends would provide citizens with "a direct means of bringing a cause of action to prohibit legislative or other government action that violates the government's obligation to protect living nature's benefits." *Id.*

First, it does not seem unreasonable to ask of any proposed social policy amendment whether it is socially acceptable and institutionally necessary. Few would support a proposal that it is neither. Second, assuming the proposal fares well under that first-level filter, we should examine its prospects for practicable implementation given its precise language and what we know about existing and foreseeable social and legal institutions. The EQA is clearly disqualified at the first of these levels, but even giving it a free pass at that level cannot avoid the reality that it is a miserable failure at the second level as well.

A. Level One Filters: Is the Proposal Socially Acceptable and Institutionally Necessary?

The EQA's advocates contend, as if there is no question about the matter, that "[m]ost Americans undoubtedly take it for granted that they have a right to clean air . . . just as they take for granted other rights of a free society," and that "[t]he only way to address the mounting threat to sound, foresighted environmental policy-making appears to be to amend the Constitution itself."⁶³ In so doing they are appealing to the sensible demand that any social policy amendment to the Constitution be not only socially acceptable, but also institutionally necessary. In other words, a social policy amendment ought to reflect broad levels of social approval and resolve some institutional obstacle to allowing that social policy to be fulfilled by means short of constitutional amendment.

1. Does the Measure Enjoy Broad Social Approval?

The "other rights of a free society" to which the EQA supporters refer are, of course, the rights detailed in the Constitution, and the reason most Americans take them for granted is because they are expressed in the Constitution—they are already constitutive "givens" for society. Hence it may not be entirely accurate to contend that the "right to clean air," whatever that may be, is "taken for granted" in the same sense as the other "rights of a free society." If they are—that is, if Americans really expect clean air as a constitutive right of society alongside free speech—then perhaps the EQA is onto something.⁶⁴

63 Brodsky & Russman, *supra* note 12, at 37.

64 One commentator has suggested that the right to a clean environment is "pre-existing" in the sense that it can be inferred from the Preamble to the Constitution, which describes as one purpose of the Constitution to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity. . . ." U.S. CONST. preamble. See, e.g., Schmaltz, *supra* note 6, at 458 n.44. Of course, this interpretation of the Preamble would support a "right" to a good job, a decent home, a good educa-

On its face, the supermajoritarian ratification procedure of Article V suggests that broad and deep social acceptance is a minimum necessity for any amendment proposal to succeed and thus is a given for any proposal that does succeed. Indeed, the history surrounding some failed social policy amendments supports the view of the amendment process as a test of national consensus.⁶⁵ Why, therefore, concern ourselves with examining the breadth and depth of support for *proposed* amendments?

Relying entirely on Article V, however, may lead to a false sense of security in this respect. Some commentators, for example, have observed that an amendment could be ratified with relatively little active support if it also has relatively little active opposition and most people simply believe the measure will not make a significant difference one way or the other.⁶⁶ Still others argue that amendments more often reflect a social mood just short of revolution, a time in which "conduct[ing] our legal business as usual, seeking certainty and harmony rather than tolerating discord, is to miss the very essence of the event at hand."⁶⁷

Under any view, of course, the life or death of an amendment proposal is a profoundly political question, and there must be some sizeable group in society that believes deeply in the proposal's message. That group may be so large that it approaches consensus; it may be sufficiently large to achieve ratification in the face of the majority's indifference; or it may be so vocal and driven as eventually to spark support in larger numbers. Those three paths, however, present fundamentally different political climates both before and after ratification. Given the constitutional disfavor of factions and the American distrust of special interest groups,⁶⁸ we should demand that social pol-

tion, and a whole package of other social welfare policies not generally understood as having the status of pre-existing constitutional rights. Indeed, all efforts to have a right to a clean environment recognized under the existing Constitution have failed. *See id.* at 462-64; Cusack, *supra* note 22, at 175-79; Futrell, *supra* note 6, at 50 n.9.

65 *See* KYVIC, *supra* note 4, at 394-425 (exploring the political climate leading to the eventual failure of the Equal Rights Amendment); Pinguelo, *supra* note 22, at 288 (observing that the experience of New Jersey's ratification of a state constitutional EQA "demonstrates that non-partisan political support and the support of competing special interests are key ingredients").

66 *See* VILE, *supra* note 20, at 28 (suggesting that this was the eventual Federalist attitude toward the Bill of Rights, which allowed its ratification).

67 Tribe, *supra* note 2, at 436.

68 *See* VILE, *supra* note 20, at 95-96 (discussing Prohibition and the Equal Rights Amendment as examples of efforts by special interest groups to achieve constitutional endorsement of their agendas, one temporarily successful and the other a failure after long political debate).

icy amendment proposals demonstrate broad and deep social support. An amendment made possible by the majority's indifference, or born of revolutionary zeal, may present unanticipated political turmoil after ratification when its support is tested by the realities of implementation. The first question to ask of any amendment proposal, therefore, ought to focus on defining the base and depth of its support.

The EQA, for example, fits the third of the support models—the zealous minority—or at least that is where its supporters have positioned it. First, although its supporters contend that we all take the essence of the EQA for granted, they have to concede that the EQA does not enjoy consensus support. Although the EQA supporters claim their opposition is limited to a “powerful band of extremist ideologues,”⁶⁹ suggesting that opposition to the EQA would be isolated to this out of touch cabal, they also claim that this small band has carried out what they describe as a “concerted attack on environmental laws” allied with “powerful economic forces” that have found “champions in Congress and in state legislatures.” But if this alleged attack is sufficiently serious to prompt proposal of an EQA in response, can it represent the views of only an insignificant portion of society? Indeed, one ought to ask why, if the insurgents are so small a group, they nonetheless became so powerful, have so deeply influenced Congress and state legislatures, and require an amendment to the Constitution to put them down. This sounds like all-out war, not consensus.

The EQA also will not find ratification through the second support dynamic, that of majority indifference. Indeed, environmental policy today is characterized by a large centrist group flanked by *two* bands of powerful extremist ideologues. On the one side are, in fact, the forces decried by the EQA supporters, those who place property rights and personal economic gain ahead of collective environmental benefits.⁷⁰ I will refer to them as the “browns.” On the other side

69 Brodsky & Russman, *supra* note 12, at 37.

70 See, e.g., RON ARNOLD & ALAN GOTTLIEB, *TRASHING THE ECONOMY: HOW RUN-AWAY ENVIRONMENTALISM IS WRECKING AMERICA* (2d ed. 1994) (manifesto from the modern property rights movement's informal founders). See generally JACQUELINE VAUGHN SWITZER, *GREEN BACKLASH: THE HISTORY AND POLITICS OF ENVIRONMENTAL OPPOSITION IN THE U.S.* (1997) (history of the emergence of the property rights movement); *LAND RIGHTS: THE 1990'S PROPERTY RIGHTS REBELLION* (Bruce Yandle ed., 1995) (collection of essays on the property rights movement). These extreme property rights advocates have managed to reshape mainstream politics to the point that some idols of die-hard preservationists, such as the Endangered Species Act, are fighting to remain intact. See Schlickeisen, *supra* note 12, at 199–200 (discussing the emergence of the property rights movement and its effects on the Endangered Species Act

are—no surprise here—the EQA supporters, at least those who are deeply committed to preservationism as a collective right that preempts individual rights. I will refer to them as the “greens.” Both the browns and the greens are powerful, ideological, intolerant, committed, and unyielding. Not surprisingly, centrist-leaning commentators have begun to ferret out the browns and the greens, and the pitched battles of rhetoric and brinksmanship they play in political settings, as the major obstacles to progressive evolution of environmental policy.⁷¹

The problem for the greens, of course, is that the browns already have a home base in the Constitution—the Fifth Amendment’s prohibition of governmental takings of private property without just compensation.⁷² The greens want one too, plain and simple,⁷³ and they

programs and politics); J. B. Ruhl, *Section 7(a)(1) of the “New” Endangered Species Act: Rediscovering and Redefining the Untapped Power of Federal Agencies’ Duty to Conserve Species*, 25 ENVTL. L. 1107, 1137–42 (1995) (same).

71 See, e.g., J. Baird Callicott & Karen Mumford, *Ecological Sustainability as a Conservation Concept*, 11 CONSERVATION BIOLOGY 32, 34 (1997) (identifying “resourcism” and “preservationism” as philosophies that dominated the first three quarters of the twentieth century); Marc R. Poirier, *Property, Environment, Community*, 12 J. ENVTL. L. & LITIG. 43, 45 (1997) (identifying the roots of the “property encomium” and the “environmental jeremiad”).

72 U.S. CONST. amend. V. Spurred by recent Supreme Court decisions indicating an increased willingness to find and redress uncompensated takings and exactions, both the browns and, ironically, the greens, have suggested that the Fifth Amendment poses a substantial barrier to environmental regulation. In fact the string of recent decisions has had little effect on environmental regulation and is unlikely, assuming federal and state governments design environmental regulations with the Fifth Amendment in mind, to require any fundamental shift in policy or approach. See Glenn P. Sugameli, *Takings Issues in Light of Lucas v. South Carolina Coastal Council: A Decision Full of Sound and Fury Signifying Nothing*, 12 VA. ENVTL. L.J. 439 (1993).

73 See Freyfogle, *supra* note 14, at 166–71 (describing the Bill of Rights and the Fourteenth Amendment as fundamentally anti-environmental and concluding that “[o]ur Constitution needs a green amendment today principally to serve as a counterbalance” to those provisions). The EQA proposals made to date, however, supply virtually no *enforceable*, as opposed to *symbolic*, counterbalance in that respect. Short of outright repeal to the takings clause in cases of environmental regulation, an EQA would not counter the government’s duty to compensate in cases of regulatory takings. In other words, empowering or requiring Congress to protect the environment, without more, does not alter the duty to compensate in takings cases any more than the power to regulate commerce between the states does. Moreover, providing Congress the enumerated duty or power to regulate on behalf of the environment, without more, prescribes no level of regulation or method of choosing between environment and economy. To provide a substantive counter to the alleged anti-environment provisions in the Constitution, therefore, an EQA would need to reverse the takings clause in cases of environmental regulation and actively “tip” government decision-making in favor of the environment when policy decisions present environ-

know they must play to the center to get it. They also know, however, that the vast center has not bought into the green agenda. Although most people in the United States proclaim themselves to be "environmentalists," they are not true greens either in lifestyles or political views and would sooner give up the environmentalist badge than become so.⁷⁴

The EQA, in other words, does not fit the second model of support for amendments. Far from being indifferent to questions of environmental policy, the center has a well-defined vision of balance between the two poles and will not tolerate frontal assaults from either side. Hence the browns' push in the 104th Congress to dilute environmental laws and enact a property rights regime was an abysmal failure.⁷⁵ The EQA proponents may have learned their lesson from the browns' setback, knowing that their dream agenda, if laid bare in the EQA, would meet the same fate,⁷⁶ for the text of the proposal falls short of saying what they really would like to see in the Constitution—an environmental trump card on the Fifth Amendment Takings Clause. They know that saying so explicitly in the EQA would render it a political nonstarter. On the other hand, while drafting the measure to impose an environmental protection right only on the government would make the measure more politically acceptable, doing so would not nullify the government's duty to provide just compensation

ment versus economy choices. No EQA proposal has done so, and, for reasons outlined in the text, no EQA proposal is likely to do so in the foreseeable future.

74 Public opinion polls show that Americans who say they care about the environment have grown in number steadily through 1991, to more than 60% of the population, and have plateaued at a level at which environmentalism can be considered "mainstream." Nevertheless, only a small fraction of those "environmentalists" actively make environmentalism their way of life through dedicated recycling, composting, water conservation, xeriscape, and so on. See Tibbett L. Speer, *Growing in the Green Market*, 19 AM. DEMOGRAPHICS 45 (1997); Peter Stisser, *A Deeper Shade of Green*, 16 AM. DEMOGRAPHICS 24 (1994); Traci Watson, *For Most Americans, It's not Easy Being Green*, USA TODAY, Apr. 22, 1998, at 3A. Some commentators find the mainstreaming of American environmentalism a disturbing indication that environmentalists have "caved in" to economic development interests, against which they call for emergence of a new radical, noncompromising environmental movement to regain the ground they perceive has been lost. See MARK DOWIE, *LOSING GROUND: AMERICAN ENVIRONMENTALISM AT THE CLOSE OF THE TWENTIETH CENTURY* (1995).

75 See Richard J. Lazarus, *Fairness in Environmental Law*, 27 ENVTL. L. 705, 708–10 (1997) (tracing the "broadside challenge" to environmental protection laws of the 104th Congress, and demonstrating that "virtually none of the reform efforts resulted in legislative change").

76 See *id.* at 710 ("Those who support the basic philosophy and goals of federal environmental law should not mistake the public's rejection of the 104th congressional agenda for the absence of concerns about unfairness in environmental law.").

for takings; indeed, it would likely force the government into physical or regulatory takings situations more frequently than under present law.

Thus, the EQA supporters appear to be channeling their efforts into the "quasi-revolution" model of support for amendments. The text of the EQA, while not directly fulfilling their wish list, is sufficiently green in its prohibitory function to provide them a rallying point and foothold for future legislative and judicial battles with the browns, but is sufficiently vague as to what the citizen-citizen rights mean to avoid engendering swells of opposition from centrist ranks. Indeed, through a campaign of brown-bashing,⁷⁷ the EQA proponents hope to spark the revolution that brings the center to their camp long enough to make the EQA our twenty-eighth amendment. Before being swept up by the revolutionary fervor, however, it is important for the centrists to consider what the extremists behind the EQA really want in the long run. Is the EQA only about what those in the center already "take for granted"? Are the browns the only target of the EQA hammer? Or, after the love affair is over, will the greens turn the EQA on the centrists as well, using the "citizens' duty" feature of the EQA to wage litigation that undermines property rights advocates' sacred shrine without directly implicating the Takings Clause? Only ratification of the EQA will tell us in the long run, but do we really want to know?

The Eighteenth Amendment is our reminder from the past that the absence of broad and deep social acceptance for the position embodied in a social policy amendment should raise a red flag. The rigors of Article V may obscure which path an amendment takes in garnering support toward ratification, leading us to believe that we need not ask the question; yet, as Prohibition illustrates, which path of support dynamic is taken makes a difference. We should not repeat the mistake of being lulled into a false sense of security that success or failure under Article V is all we need to ask in terms of an amendment's support. Rather, even in the early stages of an amendment proposal's life, we should examine its support dynamic for evidence of the seeds of postratification calamity. Those seeds unquestionably are present in the EQA.

⁷⁷ Most of the literature covering the property rights movement emanates from groups closely associated with extreme preservationism, who deride the property rights movement at every opportunity for the effect they have had on the environmentalists' agenda. See, e.g., *LET THE PEOPLE JUDGE: WISE USE AND THE PRIVATE PROPERTY RIGHTS MOVEMENT* (John Echeverria & Raymond Booth Eby eds., 1995) (collection of articles and essays by environmentalists about the property rights movement).

2. Can the Measure Not Be Implemented by Means Other Than Constitutional Amendment?

Assuming that levels of social approval for a proposed social policy amendment are sufficient to make the chances of ratification significant, another question to ask is whether the goal is one that can be carried out only through constitutional amendment. Measures with purely functional operations and intra- or intergovernmental relations targets, such as limiting the terms of the President, have no choice but to follow the amendment procedure. But social policy decisions, depending on their nature, can be and have been implemented by federal or state political institutions short of constitutional revision. If social acceptance of the proposition is significant, why not work it through those means rather than by constitutional amendment?

One answer, of course, is that the effort required to achieve ratification of an amendment, while significant, can lead to a far more sweeping and permanent expression of the social policy than can be achieved through federal or state legislation or judicial decision. Through an amendment, the social policy becomes applicable to all named institutions regardless of local politics or shifting of coalitions. Enforcement of the measure, if not carried out aggressively by political institutions, can be sought through relentless litigation. Reversal of the measure, while not impossible, is likely more difficult than reversal of legislation. This entrenchment of the social policy is the ultimate prize of an amendment, and is what may make the amendment route attractive to groups, such as the EQA proponents, that have significantly less than consensus support for their underlying social policy agenda.⁷⁸

But the political advantages gained by embodying the social policy in an amendment, real or perceived, do not mean that the social policy *must* be implemented through an amendment. If every political battle over social policy were settled through constitutional amendment, the Constitution would begin to operate as a legislative, rather than constitutive, vehicle for law—it would cease being a constitution. The value of having a constitutive source of law is to provide “an evolving repository of the nation’s *core* political ideals and as a record of the nation’s *deepest* ideological battles. . . .”⁷⁹ To use the Constitution as a record of what should be routine legislative decisions, thus cluttering it with “regulatory specifics,” results in a docu-

⁷⁸ See Tribe, *supra* note 2, at 441–42 (“As the history of prohibition illustrates, enacting such [substantive] measures through constitutional amendment rather than by statute renders them dangerously resistant to modification.”) (footnote omitted).

⁷⁹ *Id.* at 442 (emphasis added).

ment which can demand no such constitutive respect.⁸⁰ There has to be some quality of the Constitution that preserves a difference between it and routine legislative authority.⁸¹

The question of need, therefore, is whether there is any institutional barrier to fulfilling the fundamental, widely accepted social policy through routine legislative and judicial forums. Several amendments, for example, have reversed Supreme Court interpretations of the Constitution that prevented or impeded indoctrination of widely accepted social policies.⁸² In such instances the Supreme Court's decision had "stuck" the institutional machinery in a position contrary to desired social policy. In different circumstances some amendments have forced an intransigent minority of states to come into line with the rest of the nation on fundamental social policy issues associated with matters traditionally (or constitutionally) left to state jurisdiction.⁸³ Where federal legislation cannot impose the policy over state resistance and the courts cannot mold the existing constitutional text to handle the stubborn states, an amendment is the only alternative. These are examples of institutional necessity, where an amendment, and only an amendment, can allow the widely accepted social policy to move forward in society. Amendment proposals that do not satisfy this condition ought to be avoided.⁸⁴

That kind of necessity cannot be attributed to the EQA. Rather, concerned that the browns are winning some battles in federal and

80 *Id.*

81 See Griffin, *supra* note 22, at 2137 ("One purpose of placing only the most fundamental principles in the Constitution was to preserve the difference between the Constitution and ordinary law.").

82 The first section of the Fourteenth Amendment, giving full citizenship to all persons born or naturalized in the United States, reversed the Supreme Court's decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), that the Missouri Compromise barring slavery from the territories was unconstitutional. The Twenty-Sixth Amendment, giving voting rights to citizens eighteen years and older, reversed the Court's decision in *Oregon v. Mitchell*, 400 U.S. 112 (1970), that the Constitution does not prohibit the states from establishing twenty-one as the minimum voting age. The Nineteenth Amendment, giving voting rights to women, nullified an 1874 decision of the Court in *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874), ruling that states could limit voting rights to men alone. See generally Dellinger, *supra* note 20, at 414-15; Ginsburg, *supra* note 18, at 686-89.

83 The voting rights amendments, for example, not only negated Supreme Court rulings leaving matters of enfranchisement to the states, see *supra* note 48, but also then dictated the national policy to all the states.

84 See also Developing Standards, *supra* note 21, at 10-11 (including as one of the criteria for evaluating amendment proposals the condition that "Constitutional amendments should be utilized only when there are significant practical or legal obstacles to the achievement of the same objective by other means").

state legislatures and courts, the EQA proponents have wildly overstated the degree of threat to make it appear as if a case of institutional necessity, and not merely a political rumble, is at hand.⁸⁵ For example, they contend that the Supreme Court "has reinterpreted the commerce clause of the Constitution to set limits on congressional authority to enact laws protecting public health, safety and welfare."⁸⁶ They refer to the Supreme Court opinion in *United States v. Lopez*,⁸⁷ ruling that federal legislation banning guns near schools exceeded congressional authority because the prohibited actions did not substantially affect interstate commerce. In fact, the decision does not "reinterpret" the Commerce Clause,⁸⁸ and has had no discernible effect on Congress' ability to craft environmental regulation.⁸⁹ The EQA proponents are on equally shaky ground when they contend that the amendment is institutionally necessary because the Court "has barred suits by private citizens to compel state governments to carry

85 Some commentators advocating adoption of an EQA do not go so far as to make the institutional necessity argument, but rather focus on what they contend is generally the "conservatism" of the Supreme Court in environmental issues and the propensity of Congress to accede to economic interests adverse to the environment. See, e.g., Schmaltz, *supra* note 6, at 453; Schlickeisen, *supra* note 12, at 229-33. Assuming the necessity criterion were relaxed, it remains unclear how these commentators believe an EQA, short of prescribing regulatory specifics, would prevent the Supreme Court and Congress from continuing their track record when it comes time to implement and interpret the EQA. See *infra* text accompanying notes 105-10.

86 Brodsky & Russman, *supra* note 12, at 37.

87 514 U.S. 549 (1995).

88 See William Funk, *The Lopez Report*, 23 ADMIN. & REG. L. NEWS 1, 1 (1998).

89 See *id.* at 14-15 (reviewing environmental regulation cases decided under *Lopez*). One court has invalidated an environmental regulation that purported to extend jurisdiction over actions that *could* affect, rather than *substantially* affect, interstate commerce. See *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997). Because the court found the rule exceeded the statutory grant of authority to the agency, the court only suggested that the regulation may also exceed the reach of federal constitutional power. See *id.* at 257. Beyond that minor potential setback, which the agency can redress simply by redrafting the regulation to include the magic word substantially, no environmental regulation has suffered harm under *Lopez*. See, e.g., *National Home Builders Ass'n v. Babbitt*, 130 F.3d 1041, 1045-53 (D.C. Cir. 1997) (application of Endangered Species Act to protect intrastate habitat of an endangered fly does not exceed Congress' commerce power); *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997) (application of Superfund law to isolated, intrastate contaminated site does not exceed Congress' commerce power); *Solid Waste Agency of North Cook County v. United States Army Corps of Eng'rs*, 998 F. Supp. 946, 951-53 (N.D. Ill. 1998) (application of Clean Water Act section 404 to protect isolated intrastate wetlands does not exceed Congress' commerce power).

out environmental laws"⁹⁰ and "curtailed the ability of Congress to require state adherence to national environmental standards."⁹¹ In short, the argument that the Supreme Court has erected institutional barriers to progressive environmental policy that can be torn down *only* with a constitutional amendment is specious at best, perhaps even disingenuous.⁹²

Moreover, despite the slowing of federal and state environmental regulation that the browns have achieved on some fronts, it could not reasonably be said that federal environmental policy cannot be installed over the wishes of intransigent states. The *Lopez* case provided

90 Brodsky & Russman, *supra* note 12, at 37. This charge is leveled against the Court's decision that the Eleventh Amendment bars suits brought under so-called "citizen suit" provisions, which are found in many federal environmental laws, to compel state compliance with federal law. See *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). The effects of the decision are narrow, however, as (1) the Eleventh Amendment does not apply to city, county, and other sub-state governmental entities; (2) the Court specifically preserved the *Ex Parte Young* doctrine allowing citizens to sue state officials for violating federal laws; and (3) the Eleventh Amendment does not bar the United States from enforcing federal law against states or from preempting state law altogether. See PERCIVAL, *supra* note 8, at 332-34.

91 Brodsky & Russman, *supra* note 12, at 37. Here their concern is with *New York v. United States*, 505 U.S. 144 (1992), which held that Congress may not compel the states to enact or implement environmental regulations. The Court held that Congress could not require states to take title to low-level nuclear waste if they did not permit a disposal facility for such waste. See *id.* at 159-66. The decision does not, however, prevent Congress from imposing federal environmental protection regulations directly on or in the states. Moreover, the Court specifically upheld the practice, commonly used in federal environmental laws adopting so-called "cooperative federalism" frameworks, of enticing the states to adopt and enforce federal law as state law through financial support and delegation of authority. See *id.* at 166-69. By preserving such approaches, and precluding only the approach of forcing states to regulate in line with federal wishes, the impact of the decision is minimal in environmental law. See PERCIVAL, *supra* note 8, at 118-19.

92 Indeed, a growing body of literature outlines how, in the appropriate political climate, biodiversity can be protected through extension of existing legislative initiatives, and with greater speed and precision than an EQA could offer. See Richard J. Blaustein, *Biodiversity and the Law*, 26 ENVTL. L. 1313, 1318 (1996) (reviewing *BIODIVERSITY AND THE LAW* (William J. Snape III ed., 1996)) (arguing that the time it would take for judicial interpretation to put the EQA in motion on behalf of biodiversity protection is too long compared to the other avenues of legal reform suggested in the biodiversity literature such as the book reviewed). By contrast, the Supreme Court has struck down state and federal legislation prohibiting burning of the United States flag. See *United States v. Eichman*, 496 U.S. 310 (1990) (federal legislation); *Texas v. Johnson*, 491 U.S. 397 (1989) (state legislation). Advocates of the flag burning amendment, therefore, have a legitimate argument that their amendment, assuming it were to gain sufficient public support, is institutionally necessary. See *Developing Standards*, *supra* note 21, at 12.

the best ammunition the browns have had since the dawn of federal command-and-control regulation to erect a federalism barrier to environmental regulation, and it fell far short of insulating states from the federal will. Indeed, many commentators believe the states offer the best hope for progressive and innovative evolution of environmental protection policy.⁹³ The states are far out in front of the federal government in programs dealing innovatively and effectively with such thorny issues as ecosystem protection policy,⁹⁴ growth management,⁹⁵ and nonpoint source water pollution.⁹⁶ The problem for the greens, if anything, is Congress, and whether it remains committed to imposing national environmental policy consistent with the green agenda through federal legislation. That is a political question, however, not a matter of institutional structure that can be solved only through an amendment to the Constitution.

93 One leading environmental law commentator goes so far as to say that "[o]ne need only look to America's own states—its environmental 'test tubes'—for signs of important environmental goings-on." Bud Ward, *The Train Moves On*, 11 ENVTL. F. 41, 46 (1994). See also John Pendergrass, *You Say You Want a Devolution*, 12 ENVTL. F. 8 (1995) ("[M]any, if not most, of the best and most innovative ideas in environmental and natural resource protection have come from the states."); John Pendergrass, *A Rich History of State Innovation*, 11 ENVTL. L. 12 (1994) (describing several of the ideas emanating from states that eventually became embedded in federal requirements applicable to all states); Robert L. Rhodes, Jr., *Where Do We Go from Here? Reforming U.S. Environmental Laws In Congress*, 26 Env't Rep. (BNA) 991 (1995) (contending that "state governments are more able to take on a large role in protecting the environment"); *State Cleanup Systems More Effective Than Federal Superfund Program, Report Says*, 26 Env't Rep. (BNA) 982 (1995) (former EPA official contends "[s]tates are cleaning up contaminated waste sites 'at a fraction of the time and cost' of the federal superfund program"). Recently, in order to share with each other their innovations and successes, the states formed the Environmental Council of the States (ECOS). See Mary A. Gade, *When the States Come Marching In*, NAT. RESOURCES & ENV'T, Winter 1996, at 3. (Ms. Gade, the director of the Illinois Environmental Protection Agency and first president of ECOS, contends that "the environmental system that has given us unprecedented and extraordinary environmental progress to date, is now outmoded and unable to meet the environmental challenges ahead. And that is where the states come marching in—somewhat brazenly and clearly in lockstep.").

94 See Sara Parker, *The CRM Approach: Protecting Missouri's Natural Heritage*, NAT. RESOURCES & ENV'T, Winter 1996, at 10; Douglas P. Wheeler, *An Ecosystem Approach to Species Protection*, NAT. RESOURCES & ENV'T, Winter 1996, at 7.

95 See George E.H. Gay, *State Solutions to Growth Management: Vermont, Oregon, and a Synthesis*, NAT. RESOURCES & ENV'T, Winter 1996, at 13.

96 See M. Allison Hamm, *The Massachusetts Experience with Nonpoint Sources: Regulators Beware!*, NAT. RESOURCES & ENV'T, Winter 1996, at 47.

B. Level Two Filters: Can the Proposal Be Practicably Implemented?

A finding of acceptance and need for an amendment does not end the inquiry, as we must examine the language chosen for the measure to ensure it will practicably implement what the amendment prescribes as social policy. A long list of factors may go into describing the implementability of any legal measure,⁹⁷ but three basic qualities appear of particular importance for purposes of evaluating the text of constitutional amendments: enforceability; clarity; and durability. The EQA, for example, fails in all three respects.

1. Is the Measure Easily Reducible to Legally Enforceable Principles and Means?

When a polity's constitutive document speaks of the creation of rights and the prohibition of government actions, it ought also to establish the means of delivering on those promises. In other words, a means of enforcement is essential to prevent the constitutive purpose from dissolving into aspirational emptiness, and ultimately, losing its constitutive impact. Of course, no amendment to the Constitution is completely self-executing;⁹⁸ rather, each depends on the institutional structure established in the main body of the document for its enforcement. Commentators have differed over which of the two principal sources of enforcement, the Supreme Court acting through interpretation or Congress acting through legislation, provides a better platform for implementation of social policy amendments.⁹⁹ In

97 For example, in his comparison of the three different vehicles of constitutional change—amendments, judicial interpretations, and legislation—John Vile uses a wide array of criteria: ease, range, direction, speed, visibility, stability, flexibility, democracy, protection of minority rights, susceptibility to special interests, federalism, separation of powers, perceived legitimacy, historical and textual support, safety and regularity, prolixity and style, clarity, unity, deliberation, respect for the Constitution, and constitutional atrophy, efficacy, finality, adequacy, and interaction. See VILE, *supra* note 20, at 85–115. Many of his criteria focus on procedural qualities; the rest can be encapsulated in the three broad qualities I describe.

98 See Developing Standards, *supra* note 21, at 15 (“most existing constitutional amendments are . . . silent regarding the means of enforcement”). Some amendments go so far as to at least specify which governmental bodies may enforce the measure. See, e.g., U.S. CONST. amend. XVIII, § 1 (repealed Dec. 5, 1933) (“The Congress and the several States shall have the concurrent power to enforce this article by appropriate legislation.”); U.S. CONST. amend. XXVI, § 2 (“The Congress shall have the power to enforce this article by appropriate legislation.”).

99 Compare Robin West, *The Aspirational Constitution*, 88 Nw. U. L. REV. 241 (1993) (advocating a legislatively enforced, aspirational style of constitutionalism), with Steven G. Calabresi, *Thayer's Clear Mistake*, 88 Nw. U. L. REV. 269 (1993) (contending the U.S. model of a judicially enforced constitution is superior).

either case, however, there must be something tangible in the measure for the authority to enforce. The measure must be capable of being translated into enforcement tools suited to the enforcement body, which requires such basics as terms capable of being defined, prohibitions with parameters capable of being described, and expressions of rights capable of being detailed in enforcement mediums.¹⁰⁰

As the EQA strikingly illustrates, however, the challenge of drafting enforceable text can be insurmountable for social policy amendments. At the most basic level, for example, it will be difficult to define what comprise "the natural resources of the nation." What are "natural resources" besides the air and water referred to in the text? Some may think only of mineral resources, whereas others may include grander ideas, such as biodiversity, in the array of natural resources. Once we resolve that issue, does the "of the nation" language qualifying natural resources mean that only those natural resources belonging to the United States government are included within the scope of the EQA, or are resources in state, local, and private hands also covered?

Even if we could agree on the meanings of those and other key terms in the EQA, defining the scope of the rights and prohibitions created in the EQA would present innumerable conundrums. Will "clean and healthful air" be measured based on every citizen, including those highly sensitive to pollution, or the average citizen? Does the "heritage" right literally mean a right to inheritance, or is it simply an aspirational ideal? If heritage is meant to convey some legally enforceable right, does the reference to "generations" (of whom, United States citizens or all people of the world?) mean that all resources covered under the amendment, whichever those may be, are held in common? If the answer is that the EQA is not so sweeping, but rather should be treated as simply a constitutional codification of the doctrine of common law nuisance,¹⁰¹ why do we need the amendment?

Assuming those scope questions can be decided, the text poses difficult questions regarding the mechanics of enforcement. For example, how would present and future generations exercise their natural resources heritage rights against a private landowner who wishes to harvest trees or minerals for personal profit? Could any citizen prevent any other citizen from extracting minerals, harvesting trees, farming, developing land, operating a manufacturing plant, or engaging in

100 See Developing Standards, *supra* note 21, at 15 (Proposing that "Constitutional amendments should embody enforceable, and not purely aspiration, standards.").

101 Some commentators see this as one benefit of the EQA. See Howard, *supra* note 22, at 203; Schlickeisen, *supra* note 12, at 234.

any other activity that results in the loss of a natural resource? Could a citizen also sue the government to argue it has failed to protect natural resources when it issues a permit to, say, fill a wetlands? Will the government be required to take property by regulation in order to protect the natural resources, and if so will not compensation remain due under the Fifth Amendment notwithstanding the EQA? In short, the EQA, by targeting both citizen-citizen and government-citizen relations, seems poised to launch a tsunami of litigation over everyday life and between ordinary citizens. If that scenario is not possible under the EQA—that is, if the amendment does not mean what its text appears to say—then what does the amendment mean?

To be sure, no constitutional amendment has avoided questions like these having to do with definitions, scope, and mechanics of enforcement.¹⁰² But there is no reasonable basis for arguing that the EQA will ever lead us to answers to the questions, and that inability has proven fatal to other social policy amendment proposals.¹⁰³ The experience of environmental law over the past two decades has been one of unparalleled proliferation of regulatory and judicial text attempting to get a handle on these issues.¹⁰⁴ It is not clear how the EQA will simplify or otherwise change that legal regime, as it cannot simplify or otherwise change the underlying problems inherent in environmental management.

102 For a discussion of how state EQAs have fared with respect to similar questions of interpretation, showing how state courts have differed over a variety of fundamental implementing terms and mechanisms, see Cusack, *supra* note 22, at 182–96.

103 See *Developing Standards*, *supra* note 21, at 17 (“Proponents of the equal rights amendment were never able to answer questions about the specific legal effects of the amendment.”).

104 The U.S. Environmental Protection Agency accounts for the over 10,000 pages of final regulations found in title 40 of the Code of Federal Regulations, and the agency published almost 3500 pages of preamble and proposed and final regulations in the Federal Register during the first six months of 1994 alone. See Jerry L. Anderson, *The Environmental Revolution at Twenty-Five*, 26 RUTGERS L.J. 395, 413 (1995). The combined efforts of the EPA and the many other federal agencies with some environmental regulation jurisdiction “churn out over 35 pages of new or proposed regulations every working day.” *Id.* at 413. Guidance to help interpret these regulations abounds in even vaster quantities. The EPA’s hazardous waste management regulations, for example, filled 697 pages of the Code of Federal Regulations in 1994, but there were 19,500 pages of informal guidance accompanying them. See William H. Rodgers Jr., *Environmental Law Trivia Test No. 2*, 22 B.C. ENVTL. AFF. L. REV. 807, 812, 816 (1995).

2. Is the Measure Sufficiently Clear to Minimize Unintended Interpretations?

The use of simple, but precise, drafting has long been considered essential for the practicable implementation of constitutive principles.¹⁰⁵ This is not simply a good grammar maxim, as failure clearly to textualize the intended social policy outcome can lead to unintended interpretations and applications.¹⁰⁶

For example, many of the enforcement problems hypothesized above with respect to the EQA are problems of clarity, or rather the lack thereof. The EQA supporters presumably believe the measure necessarily will be implemented, as they put it, "to continue the impressive environmental progress achieved by the nation over the last 30 years."¹⁰⁷ But given that the EQA proponents point to the Supreme Court and Congress as the chief culprits behind the interruption of that record, it is unclear how they could conclude that the EQA will return us to the greens' intended course. Indeed, the EQA does not reverse any of the Supreme Court decisions that its supporters point to as the institutional barriers to green environmental policy, and it does not clearly require anything of Congress. The questions I pose with respect to enforcement of the EQA thus could be answered by Congress or the Court in ways that eviscerate the EQA of all meaning, and nothing in the EQA could prevent that from occurring.¹⁰⁸ Indeed, this has been exactly the experience under many state constitution EQAs.¹⁰⁹ If the EQA proponents are banking on a turnaround in Congress and the Court, they had better hope it happens *before* the

105 See Griffin, *supra* note 22, at 2137 (stating that one of the guiding principles articulated during the Federal Convention of 1787 was to use simple and precise language).

106 See Developing Standards, *supra* note 21, at 16 ("[P]roponents of constitutional amendments should attempt to think through and articulate the consequences of their proposals, including ways in which the amendments would interact with other constitutional provisions and principles.").

107 Brodsky & Russman, *supra* note 12, at 37.

108 See Futrell, *supra* note 6, at 55–56 (observing that an EQA could vest greater environmental regulation authority in the Supreme Court, which has "traditionally . . . been more closely aligned with the defense of property rights," and thus could "remove the action from the environmentalist's home base (Congress)").

109 See Horwich, *supra* note 22, at 326 ("Time and again, state courts have limited the impact of these environmental provisions. State courts have repeatedly held these environmental provisions are not self-executing: the courts ruled that they create no new rights, impose no new obligations and establish no new limits on government or private action in the absence of state legislation implementing their terms.") (footnotes omitted).

EQA is ratified, or else the EQA could be used against them.¹¹⁰ Ironically, therefore, in their barter of ambiguous text in return for increased chances of social acceptance, the EQA supporters have drafted an amendment that opens the green agenda wide to the very attack they contend requires the amendment in the first place.

3. Is the Measure Sufficiently Stable and Flexible to Provide an Enduring Statement of Social Policy?

The Constitution can provide the place for “an authoritative statement of the nation’s most important and enduring values.”¹¹¹ To be enduring in that respect, however, the text of an amendment must balance between stability and flexibility with respect to the future, lest it meet the fate of the Eighteenth Amendment. Stability, thanks to Article V, is the hallmark of the Constitution when compared to legislation.¹¹² An amendment’s ability to “freeze” social policy into future generations makes it an attractive source of permanence. The Thirteenth Amendment’s prohibition of slavery, for example, is not the type of decision we consider open for ongoing legislative “discussion” now or in the future. On the other hand, social policy decisions for which we desire that degree of permanence may be rare, and misjudging the undulations of social norms while freezing one generation’s conception into place can lead to grave mistakes such as the Eighteenth Amendment. Mistakes can be undone even in the Constitution, but as we become lackadaisical in that respect the Constitution will begin to resemble the legislative process and lose its authoritative potency. Leaving some room for legislative and judicial interpretations of an amendment’s policy statement, while sacrificing some of the permanence of the statement, can provide the escape valve for when social norms drift. Flexibility, therefore, may be a necessary feature of a social policy amendment if it is expected to endure. Hence, when considering a social policy amendment, “the key . . . is to decide which objects of government are permanent and which are not,”¹¹³ and then devise a text that captures the appropriate balance between stability and flexibility.

110 On the other hand, if the hoped-for turnaround happens sooner rather than later, the argument for institutional necessity becomes even weaker than it is today. See *supra* text accompanying notes 63–96.

111 Tribe, *supra* note 2, at 441.

112 See VILE, *supra* note 20, at 91–92.

113 *Id.* at 92. See also Developing Standards, *supra* note 21, at 7 (“[C]onstitutional amendments should address matters of more than immediate concern that are likely to be recognized as of abiding importance by subsequent generations.”).

The EQA, for example, could not be faulted for addressing a topic of only transitory importance. Environmental quality will remain of abiding importance to humans for as long as there are humans. Where the EQA goes astray, however, is in its lack of flexibility in dealing with the inherent intergenerationality of the environment. Just as some commentators have observed that the New Deal legislation finds no place marker in the Constitution notwithstanding its extensive legislative record,¹¹⁴ neither does the extensive federal command-and-control environmental regulation framework spawned in the last thirty years. The EQA is an overt attempt to lock *that* regime into place for the future. But the effort comes at a time when the weight of environmental policy commentary concludes that the command-and-control regime is out of date and out of touch.¹¹⁵ At all levels of deliberation, the emerging theme of sustainable development is focusing environmental policy on the future, but in a way that eschews extrapolation of the sea of predefined rules and interminable litigation characteristic of the old style of environmental policy.¹¹⁶ The EQA, by contrast, would lock us into the regulate-litigate model of environmental policy as a matter of constitutive principle. Like the Eighteenth Amendment, the sure fate of the EQA, drafted as it is, would be ignominy instead of endurance.

114 See VILE, *supra* note 20, at 92.

115 The movement for reform of environmental regulation based on the need for more flexibility has rapidly permeated a wide array of environmental issues. See Symposium, *Regulatory Reform*, 12 NAT. RESOURCES & ENV'T 155 (1998) (collecting articles describing flexibility reform initiatives in air pollution law, worker safety and health law, endangered species protection law, mining law, contaminated sites remediation law, and other fields).

116 At its broadest, sustainable development is the philosophy that today's progress must not come at tomorrow's expense, and that human progress thus must be sustained not just in a few places for a few years, but for the entire planet into the distant future. See Jonathan Lash, *Toward a Sustainable Future*, 12 NAT. RESOURCES & ENV'T 83, 83 (1997). In its description of the need to depart from the command-and-control model in order to implement sustainable development policy, the President's Council on Sustainable Development succinctly stated:

For the last 25 years, government has relied on command-and-control regulation as its primary tool for environmental management. In looking to the future, society needs to adopt a wider range of strategic environmental protection approaches that embrace the essential components of sustainable development

PRESIDENT'S COUNCIL ON SUSTAINABLE DEVELOPMENT, *SUSTAINABLE AMERICA* 26 (1996).

IV. CONCLUSION

An EQA is unlikely to find its way into the Constitution in the foreseeable future. So why talk about it? One reason is to understand better why what an amendment *says* is as important as the politics within which it rises or falls. The need for any amendment to express a function and a target in constitutive terms makes drafting vitally important. And, through analysis of what is said in those regards, we can identify text that would pull an amendment into the danger zones of constitutive possibilities. When those red flags are raised, we can then explore deeper into the text to probe its political roots and its future implementation prospects. By doing so for the EQA, we learn it is no mystery why, notwithstanding the elegant message of environmentalism it exudes, the EQA will not, and should not, become a part of our constitutional law.

Another reason to dwell on this sure fate of the EQA is to understand better the problems that beset the making of social policy at the legislative and judicial levels. The correct environmental policy is not as clear-cut as, say, our convictions that free speech is vital and slavery is evil. The latter are not characterized by large gray areas or competing social values. But environmental policy, like economic policy, education policy, welfare policy, and most of social policy in general, is defined by hard choices and complicated, multidimensional problems. The reason the Environmental Protection Agency has over ten thousand pages of rules is because that's how many it takes to tackle the problem. To think that environmental policy can be summed up in two sentences thus seems naïve, if not ludicrous.

Finally, to understand why the EQA is a constitutional metrics misfit allows us to understand better why there also is not a Good Jobs Amendment or a Nice Homes Amendment in the Constitution. We made a choice, over two centuries ago, to craft an operational blueprint for government that would adopt social policy sparingly and only when it was clear that the policy could and would be delivered. Constitutions of other nations loaded with aspirational statements and promises of good housing and jobs have become the subject of jokes because they fail to deliver. They fail to deliver because, in the end, how can they? Few social policy goals can be expressed as more than aspirations, something we work toward by using the institutional tools made available under the constitutive scheme. If we wish for the Constitution to avoid becoming a joke, we will do as we have done for centuries—we will continue to keep the EQA and all amendments with like “metrics” out of our Constitution's text.

